

SERVICE DATE - JULY 25, 1997

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT¹

Docket No. AB-6 (Sub-No. 207)

BURLINGTON NORTHERN RAILROAD COMPANY--
ABANDONMENT--IN GRAYS HARBOR COUNTY, WA

STB Docket No. AB-6 (Sub-No. 378X)

BURLINGTON NORTHERN RAILROAD COMPANY--ABANDONMENT
EXEMPTION--IN GRAYS HARBOR COUNTY, WA

Decided: July 15, 1997

By petition filed August 30, 1996, in Docket No. AB-6 (Sub-No. 207), Burlington Northern Railroad Company (BN)² seeks to reopen that proceeding to clarify the status of authority BN received on January 11, 1985, to abandon a 10.26-mile line between South Aberdeen Junction, WA, and Markham, WA. The track is known as the South Aberdeen-Markham Line. BN seeks “confirmation or extension of abandonment authority previously granted”³ Concurrently, in STB Docket No. AB-6 (Sub-No. 378X), BN has filed a petition for exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a 1.18-mile line of railroad, referred to as the South Aberdeen Trackage, between mileposts 1.82 and 3.00 in South Aberdeen, WA. The 10.26-mile and the 1.18-mile lines connect at South Aberdeen Junction. Both are located in Grays Harbor County, WA.

A protest has been filed by J & R Corporation (J&R) in the Sub-No. 207 proceeding. The United Transportation Union (UTU) seeks the imposition of labor protective conditions in Sub-Nos. 207 and 378X. In the Sub-No. 207 proceeding, Grays Harbor County, WA (the County) has requested a public use condition and trail use/rail banking. In the Sub-No. 378X proceeding, the City of Aberdeen, WA (the City) seeks a public use condition and requests that we issue a notice of interim trail use.

In a decision served December 6, 1996, we required BN to submit additional information to permit us to determine whether we continue to have jurisdiction over the 10.26-mile South Aberdeen-Markham Line. In that decision, we raised the question whether BN had consummated

¹ The Sub-No. 378X abandonment exemption was filed in 1996 and, consequently, is subject to the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA). The ICCTA was enacted on December 29, 1995, and took effect on January 1, 1996. It abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. In Sub-No. 207, the initial application was filed in 1984. BN’s recent filing appears to seek either new abandonment authority for the same line segment or a determination that no further abandonment authority is needed for that segment because abandonment authority was previously granted and exercised.

² On December 31, 1996, The Atchison, Topeka, and Santa Fe Railway Company merged with and into Burlington Northern Railroad Company. The name of the surviving corporation is The Burlington Northern and Santa Fe Railway Company. Because the record here was largely developed before the merger, we will refer to the petitioner as BN throughout this decision.

³ BN’s petition at 1.

abandonment of the line in 1986. We noted that the record did not contain sufficient evidence to determine whether BN had actually consummated the abandonment and whether we still had jurisdiction over the line segment. We required BN to present a more detailed discussion of the circumstances following the issuance of the certificate of abandonment and the reasons why the abandonment has or has not been consummated. BN's response included: (1) whether a consummation letter was sent to the ICC; (2) when a rail transportation contract with a shipper on the line was entered into, and if and when it was filed with the ICC; and (3) the status and type of land ownership involved. BN filed its response on December 23, 1996.

In the Sub-No. 207 proceeding, we conclude that BN abandoned the line in 1986, and that the Board no longer has jurisdiction over the line. Accordingly, we are dismissing: (1) BN's petition to reopen the proceeding; (2) UTU's request for the imposition of labor protective conditions;⁴ and (3) the County's request for a public use condition and trail use/rail banking. In the Sub-No. 378X proceeding, we are granting the exemption to permit the abandonment of the South Aberdeen Trackage, subject to environmental, public use, trail use, and labor protective conditions.

BACKGROUND

In the Sub-No. 207 proceeding, BN filed for abandonment of the South Aberdeen-Markham Line on July 30, 1984, citing the line's poor condition, low revenues, and operating losses. The line's only shipper, Ocean Spray Cranberries, Inc. (Ocean Spray), which operates a processing plant at Markham, protested the abandonment. The ICC instituted an investigation into the proposed abandonment. In a decision served January 11, 1985, the ICC concluded that the then-present and future public convenience and necessity permitted abandonment. The agency issued a certificate of abandonment on February 25, 1985.

On March 17, 1986, BN filed a rail contract with the ICC whereby BN agreed to provide Ocean Spray with rail service.⁵ On March 20, 1986, BN canceled its common carrier tariffs applicable to the line. On the same date, BN notified the ICC in a separate letter that "abandonment of the subject line had been effected on March 20, 1986."⁶

BN's rail contract arrangement with Ocean Spray continued from 1986 until April 7, 1995. On that day, the Union Pacific Railroad Company (UP) embargoed its bridge over the Chehalis River from Aberdeen to South Aberdeen. BN had operated over the bridge pursuant to rights granted by the UP. The embargo cut off BN's only rail access from its system to the South Aberdeen-Markham Line and the South Aberdeen Trackage.

Ocean Spray continues to operate its cranberry processing plant at Markham, where it makes cranberry juice and cranberry sauce. BN states that, prior to the embargo, Ocean Spray used a motor carrier for some of its outbound shipping requirements. Since the embargo, Ocean Spray has used motor carrier services for all of its inbound and outbound shipments. BN states that Ocean Spray has informed BN that Ocean Spray will not oppose the proposed abandonment of either the South Aberdeen Trackage or the South Aberdeen-Markham Line.

In the Sub-No. 378X proceeding, two shippers are affected by the cessation of operations.⁷ They are Ocean Spray, on the South Aberdeen-Markham Line, and the Weyerhaeuser Timber

⁴ We note, however, that labor protection was imposed on the 1985 grant of abandonment authority.

⁵ This was Contract Number ICC-BN-C-3269, the details of which are subsequently discussed.

⁶ BN's Response to Request for Clarification of the Record, Exhibit 4, filed December 23, 1996.

⁷ BN served copies of the petition on the two shippers affected by these abandonment proceedings. The shippers have not participated in these proceedings.

Company (Weyerhaeuser), which operates a sawmill on the South Aberdeen Trackage at South Aberdeen. According to BN, when the UP bridge was embargoed, Weyerhaeuser contracted with a motor carrier, Trailer Services, to transport its rail shipments of lumber to the Port of Grays Harbor in Aberdeen for transloading into rail cars for outbound shipment. BN states that Weyerhaeuser also has a wood pulp mill at Cosmopolis, about three miles south of South Aberdeen on the UP, and that wood pulp from that plant is also trucked to the Port of Grays Harbor for transloading into rail cars. BN states that Weyerhaeuser currently ships lumber outbound from its South Aberdeen sawmill by truck and barge and from the Port of Grays Harbor transload center by rail. BN states that Weyerhaeuser has informed BN that Weyerhaeuser will not oppose the proposed abandonment of the South Aberdeen Trackage.

DISCUSSION AND CONCLUSIONS

Sub-No. 207. In response to our December 6 decision, BN states that it originally intended to cease service and abandon the South Aberdeen-Markham Line.⁸ However, prior to taking that action, BN states that its plans changed and that it decided to negotiate a rail contract with Ocean Spray. BN and Ocean Spray entered into negotiations whereby BN would continue to operate the line once a week, as long as operating conditions would allow. BN would then effect abandonment. BN signed an agreement with Ocean Spray on March 17, 1986, to provide rail contract service for a \$500 per car surcharge, in addition to the tariff rates to offset BN's losses and to provide for line maintenance. BN adds that it intentionally forestalled consummation of the abandonment authority while talks with Ocean Spray continued, and, in the meantime, provided rail service. BN states that it assumed, and intended, that ICC jurisdiction over the line would remain effective. To that end, BN says it filed the contract with the ICC on March 17, 1986, to be effective March 18, 1986. BN acknowledges that, on March 20, 1986, it canceled tariffs for the line and sent a letter to the ICC advising that abandonment had been effected. BN notes, however, that it has not salvaged materials on the line, and that the parties' contract was in effect, and service was provided on a continued basis until UP embargoed the Chehalis River bridge on April 7, 1995.

In its protest, J&R, which says it owns fee title to property crossed by the BN right-of-way for about one mile, argues that the line was abandoned in 1986.⁹ In arguing that BN consummated the authority granted by the ICC to abandon the South Aberdeen -Markham Line, J&R points out that: (1) the ICC granted BN unconditional abandonment authority in 1985; (2) a certificate of abandonment was issued on February 25, 1985; (3) BN canceled its interstate common carrier tariffs in 1986; (4) BN ceased common carrier operations in 1986; (5) track on the segment was in poor condition, with portions broken, removed or displaced, and with one section of track covered by a landslide; and (6) BN did not object to UP's embargo of the Chehalis River bridge.

J&R also states that the County lists two parcels of property on the South Aberdeen-Markham Line right of way owned by J&R as "Abandoned RR . . ." property.¹⁰ According to protestant, the County tax assessor stated that, in order for that listing to appear, the State of Washington Department of Revenue had to have been notified by BN that the rail line had been abandoned or was no longer in service.¹¹ J&R adds that the assessor further stated that the property was put onto the County tax roll on September 24, 1986, and that, as far as the assessor was aware,

⁸ Verified statement of Richard A. Batie, Manager, Asset Rationalization.

⁹ The protest is captioned "Memorandum in Support of J&R Corporation's Objection to Petition to Re-open Abandonment," filed December 26, 1996. J&R also filed "Memos" with the Board on December 26, 1996, and March 6, 1997.

¹⁰ J&R statement filed March 6, 1997, by Jules Michel. J&R's witness states that these parcels are owned by J&R and listed as BN parcels 171024420010 and 171026210010. J&R also states that another parcel (170919120010, ownership not disclosed in pleading) is also described in this manner.

¹¹ Witness Michel states that this notification triggers a change in responsibility, moving oversight from the State of Washington to the county in question.

no one ever asked that the property be removed and returned to the State of Washington Department of Revenue. Finally, J&R avers that it also contacted the Program Manager of Utilities, State of Washington, who confirmed that the State passes on this responsibility to the County only if the carrier notifies the State that the line is abandoned.

As stated in our prior decision, the courts and this agency have held that, whether a line has been fully abandoned (i.e., whether consummation has taken place) is a question of the carrier's intent. Indicia of intent to consummate that have been identified include whether a certificate of public convenience and necessity has been issued, whether operations have ceased, whether tariffs have been canceled, whether a letter has been filed with the ICC or the Board that the abandonment has been consummated, and whether the track and ties have been salvaged. The courts, the ICC, and this agency have also made it clear that a determination of consummation must be made on a case-by-case basis after a review of the facts, and that a particular finding on one or more of the elements is not necessarily dispositive of the issue. *See, e.g., Birt v. Surface Transportation Board*, 90 F.3d 580 (D.C. Cir. 1996); *Fritsch v. I.C.C.*, 59 F.3d 248, 253 (D.C. Cir. 1995); *Black v. I.C.C.*, 762 F.2d 106, 113 (D.C. Cir. 1985); *RLTD Railway Corporation--Abandonment Exemption--In Leelanau County, MI*, Docket No. AB-457X (STB served Aug. 23, 1996).

Upon review of the record, we conclude that BN consummated the abandonment of this line in 1986. Numerous indicia of abandonment are present here. BN sought, and was granted, abandonment authority and an abandonment certificate. BN subsequently canceled its rail common carrier tariffs. BN also filed a separate letter at the ICC stating that the abandonment had been consummated. BN ceased operations as a common carrier. Following the cancellation of its tariffs, BN limited its service to Ocean Spray, pursuant to the terms of a contract between that shipper and the railroad.

Further adding to the evidence of BN's actions to abandon the line are the changes made to the property status as a consequence of BN's apparent abandonment notice to the State of Washington. According to the unrefuted J&R testimony, BN had to notify the State of Washington that the line was abandoned, apparently did so, and never recanted its notification. BN's notice affected not only BN's property,¹² but also that of non-railroad landowners.¹³

BN has argued that it did not consummate the abandonment authority granted by the ICC. Rather, the railroad says, it discontinued rail service without fully implementing the abandonment authority. BN has stated that it originally intended to abandon the line, but after negotiating with Ocean Spray, decided that abandonment was not appropriate and decided that it would continue providing service to Ocean Spray as long as operating conditions would allow. BN has argued that the filed contract required it to file amendments at the ICC, thus showing BN's intent not to abandon the line.¹⁴

In *Consolidated Rail Corp.--Petition for Declaratory Order*, 1 I.C.C.2d 284 (1984) (*Conrail*), Conrail petitioned for a declaratory order, questioning whether post-abandonment handling of overhead or bridge traffic under contract was subject to ICC jurisdiction. The ICC stated at 285:

¹² We note that only part of the property involved here is owned by BN. According to the original abandonment application filed July 30, 1984, BN claimed title to 39% of the real property involved. Response to Request for Clarification of the Record, Exhibit 1.

¹³ The record does not disclose the ramifications of BN's notice to the State that the line had been abandoned, nor are the ramifications relevant. However, the change in real property status does constitute evidence of an intent to abandon.

¹⁴ We note that the County has also argued in a letter filed January 16, 1997, that BN's weekly train service to Ocean Spray evidences a lack of actual abandonment. We also note that this letter does not indicate that it was served on any party of record. However, we will include its contents to assure a more complete record and because a lack of ability to reply to the contents of this letter will not adversely affect any parties to this proceeding.

We conclude that the overhead operations contemplated do not give rise to a common carrier obligation. Conrail has implemented the abandonment authority . . . and no longer holds itself out to provide any common carrier service over the abandoned line. Upon abandonment, the line, as a legal matter, no longer functions in interstate or foreign commerce and, in effect, is no longer an active rail line. *Application Proc.--Construct., Acq. or Oper. R. Lines*, 365 I.C.C. 516, 518 (1982). Moreover, Conrail's continued ownership of the abandoned lines does not render Conrail a common carrier with respect to the line. *State of Vt. and Vermont Ry., Inc., Acquisition and Op.*, 320 I.C.C. 609 (1964)

Thus, *Conrail* supports our finding here that BN could fully abandon this line and still provide contract service thereover.

We also note BN's claim that the letter that notified the ICC that the line had been abandoned was imprecise and summarily described BN's action only with respect to cancellation of tariffs and intent to cease regulated common carrier service. However, the letter to the ICC stating that the line had been abandoned came subsequent to the filing of the rail contract with the ICC and was an action separate from the cancellation of tariffs. We believe that the author of the letter, a BN attorney, would not have written the letter unless it reflected information from appropriate BN sources. Further, the letter references 10 names, apparently BN employees who received copies of the letter. Despite the seemingly wide dissemination of the letter, BN apparently took no further action with the ICC to retract the letter or state that it was mistakenly sent. Accordingly, we believe that BN's letter also is a factor evidencing intent to abandon the line.

BN has argued that the letter did not describe its actions taken during that period and its agreement reached with Ocean Spray.¹⁵ However, the rail contract that BN filed at the ICC is evidence of exclusivity and, in the context of the cancellation of tariffs, demonstrates BN's intent to withdraw the line from common carrier service. We also note that, had the rail contract been terminated and the line not been abandoned, in theory the traffic would once again be subject to common carrier tariffs. But, as the record shows, BN canceled the tariffs for that line segment, thus providing no way for the shipper to invoke BN's common carrier authority.

Nor does the fact that BN failed to salvage track and ties here support BN's position. Although salvage of track and ties has been treated as evidence of an intent to consummate, abandonment may be consummated notwithstanding that the track has not been removed. *See, e.g., Common Carrier Status of States, State Agencies, and Political Subdivisions*, 363 I.C.C. 132 (1980); *Consolidated Rail Corporation v. STB & USA*, 93 F.3d 793 (D.C. Cir. 1996). This is particularly true in the circumstances here, where BN needed to leave the tracks in place in order to exclusively serve Ocean Spray under contract.

In sum, all of BN's actions convincingly demonstrate that it consummated the abandonment. BN sought abandonment authority and was granted abandonment authority. Both of these actions occurred prior to BN's allegedly changed intent not to abandon the line. However, BN continued with the abandonment process, subsequently canceling tariffs, notifying the ICC that abandonment of the line had been consummated as of March 20, 1986, and apparently notifying the state government that the line had been abandoned. In sum, we believe that, instead of acting simply to discontinue service over the line, BN intended, through its actions, to continue contract service over a line it had abandoned. BN's actions resulted in operations that are analogous to that of a common

¹⁵ As indicated, according to BN, it would not abandon the line so long as operations under the parties' rail contract continued. We have reviewed the rail contract and have been unable to find any specific provision which provides that BN would not legally abandon the line. Section 14 of the contract does contain miscellaneous provisions and states, *inter alia*, that all amendments to the contract would be filed with the ICC. That, however, is not the equivalent of stating that BN would not abandon the line, especially in light of the subsequent letter to the ICC advising of the abandonment.

carrier providing service over a spur line not subject to ICC or Board jurisdiction.¹⁶ See *The Boeing Company--Acquisition and Operation Exemption--Chehalis Western Railway Company*, Finance Docket No. 31916 (ICC served Oct. 24, 1991).

In short, based on the record before us, we conclude that BN performed rail operations on a rail line over which the ICC had, and the Board has, no jurisdiction. Accordingly, because the Board lacks jurisdiction over the line, it may not reopen the Sub-No. 207 proceeding, or impose labor, public use, or trail use/rail banking conditions. As such, BN's petition to reopen, the County's request for a public use condition and interim trail use/rail banking, and UTU's request for labor protection will be dismissed. (However, as noted earlier, labor protection was imposed in the original abandonment proceeding.)

Sub-No. 378X. Under 49 U.S.C. 10903, a rail line may not be abandoned without our prior approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny of this transaction under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative time and expense of abandonment, an exemption will expedite regulatory decisions and reduce regulatory barriers to exit. 49 U.S.C. 10101(2) and (7). An exemption will also promote a safe and efficient rail transportation system, foster sound economic conditions, and encourage efficient management. Moreover, an exemption will enable BN to reallocate the funds and materials needed to maintain and operate the line elsewhere on its rail system. 49 U.S.C. 10101(3), (5), and (9). Other aspects of the rail transportation policy will not be affected adversely.

Regulation of the transaction is not necessary to protect shippers from an abuse of market power. Neither Ocean Spray nor Weyerhaeuser, the only shippers affected by this abandonment, objects to the proposal. Moreover, both shippers have alternative transportation available to them, which they have been using since service to the segment was embargoed in April 1995. To ensure that these shippers are informed of our action, we will require BN to serve a copy of this decision on each of them within 5 days of the service date of this decision and certify to us that it has done so. Given our finding regarding the probable effect of the transaction on market power, we need not determine whether the transaction is limited in scope.

Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a carrier of its obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, we will impose the labor protective conditions in *Oregon Short Line R. Co.--Abandonment--Goshen*, 360 I.C.C. 91 (1979), for the South Aberdeen Trackage.¹⁷

As stated, the City seeks a public use condition and a notice of interim trail use/rail banking (NITU) pursuant to section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d), so that it can negotiate with BN for use of the line as a trail. The City requests that BN be prohibited from disposing of the corridor, other than tracks, ties, and signal equipment, except for public use on reasonable terms, and that BN be barred from removing or destroying any trail-related structures, such as bridges, trestles, and culverts, and similar structures for a 180-day period from the effective date of the abandonment exemption. The City states that it needs the full 180-day period allowed for negotiations. The City has also submitted a statement of willingness to assume financial responsibility for interim trail use/rail banking in compliance with 49 CFR 1152.29, and has

¹⁶ Under 49 U.S.C. 10906, spur, industrial, team, switching, and side tracks are exempt from Board jurisdiction with respect to 49 U.S.C. 10901-05. Prior to the ICCTA, this exemption was set forth in 49 U.S.C. 10907.

¹⁷ As noted, the ICC already has imposed labor protection for the South Aberdeen-Markham Line.

acknowledged that use of the right-of-way for interim trail purposes is subject to future reactivation for rail service.

By letter filed November 2, 1996, BN states that it does not object to imposition of a trail use/rail banking condition. In light of BN's willingness to negotiate, a NITU will be issued under 49 CFR 1152.29. The parties may negotiate an agreement during the 180-day period prescribed below. If the parties reach a mutually acceptable final agreement, our further approval is unnecessary. If no agreement is reached during that time, BN may fully abandon the line. *See* 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

Our issuance of the NITU does not preclude other parties from filing interim trail use requests within 10 days after publication of the notice of exemption in the *Federal Register*. Nor does it preclude BN from negotiating with other parties in addition to the City during the NITU period. If, within the 10-day period following publication of the notice of exemption, additional trail use requests are filed, BN is directed to respond to them.

As an alternative to interim trail use/rail banking under the Trails Act, the right-of-way may be acquired for public use as a trail under 49 U.S.C. 10905. *See Rail Abandonments--Use of Rights-of-Way as Trails*, 2 I.C.C.2d 591 (1986) (*Trails*). Under section 10905, the Board may prohibit the disposal of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment.

The City's submission meets the requirements for a public use condition in 49 CFR 1152.28(a)(2) by specifying: (a) the condition sought; (b) the public importance of the condition; (c) the period of time for which the condition would be effective; and (d) justification for the imposition of the period of time requested. Accordingly, the requested 180-day public use condition will also be imposed. When the need for interim trail use/rail banking and public use conditions is shown, both conditions can be imposed to run at the same time, subject to execution of a trail use agreement. *See Trails*, 2 I.C.C.2d at 609. We note that a public use condition is not imposed for the benefit of any one potential purchaser, but rather to provide an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes. All interested parties are encouraged to promptly pursue negotiations, as the 180-day period for public use negotiations is statutory and cannot be extended.

The parties should note that operation of the trail use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in *Trails, supra*, offers of financial assistance (OFAs) to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking and public use. Accordingly, if a formal expression of intent to file an OFA is timely filed under 49 CFR 1152.27(c)(2), the effective date of this decision and notice will be postponed 10 days beyond the effective date indicated here. In addition, the effective date may be further postponed at later stages in the OFA process. *See* 49 CFR 1152.27(e)(2) and (f). Finally, if the line is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and trail use and public use precluded. Alternatively, if a sale under the OFA procedures does not occur, trail use and public use may proceed.

BN submitted an environmental report with its petition and served it on appropriate Federal, state, and local agencies as required by 49 CFR 1105.7(b). Our Section of Environmental Analysis (SEA) examined the report, verified its data, and analyzed the probable effect of the proposed abandonment on the quality of the human environment. SEA served an environmental assessment (EA) on November 4, 1996, in which it concluded that two aspects of the abandonment raised environmental concerns.

The first area of concern is an archaeologically-sensitive area that exists west of the Neushkah River. The Washington State Office of Archaeology and Historic Preservation (SHPO) recommends that no disturbance of the existing ballast occur when salvaging track material. The SHPO requests documentation that this recommendation is being followed by providing before and after photographs from fixed photo points. The railroad states that all salvage operations are being

conducted by private contractors, who must comply with all federal regulations concerning items of archeological significance. Pending resolution of these issues, SEA recommends imposition of a condition stating that BN shall retain its interest in, and take no steps to alter, the historic integrity of the archaeologically sensitive area west of the Neushkah River until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f.

The second area of concern involves endangered species. The U.S. Fish and Wildlife Service, Western Washington Regional Office, has identified four Federally-listed species within the study area: the Bald eagle, the Brown pelican, the Peregrine falcon, and the Western snowy plover. SEA recommends imposition of a condition stating that BN shall not engage in any salvage activities on the line until the section 7 process under the Endangered Species Act, 16 U.S.C. 1536, has been completed.

Subject to the recommended conditions, SEA has concluded that the proposed abandonment, if implemented, will not significantly affect the quality of the human environment or the conservation of energy resources. SEA also has determined that the right-of-way may be suitable for other public use following abandonment. Comments on the EA were due December 4, 1996, but none was received. We adopt SEA's analysis and recommended conditions. Accordingly, based on SEA's recommendations, we conclude that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. BN's petition to reopen in Sub-No. 207 is dismissed for lack of jurisdiction.
2. The County's request in Sub-No. 207 for imposition of a public use condition and trail use/rail banking and UTU's request for labor protective conditions are dismissed for lack of jurisdiction.
3. The request in Sub-No. 378X for the opportunity to negotiate for interim trail use/rail banking under 16 U.S.C. 1247(d) and for a public use condition under 49 U.S.C. 10905 is accepted.
4. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903 the abandonment of the above-described line in Sub-No. 378X, subject to: (1) the condition that BN retain its interest in, and take no steps to alter, the historic integrity of the archaeologically sensitive area west of the Neushkah River until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f; (2) the condition that BN not engage in any salvage activities on the line until the section 7 process under the Endangered Species Act, 16 U.S.C. 1536, has been completed; (3) the employee protective conditions in *Oregon Short Line R. Co.--Abandonment--Goshen*, 360 I.C.C. 91 (1979); (4) the condition that BN comply with the terms and conditions for implementing interim trail use/rail banking under 16 U.S.C. 1247(d) and our rules at 49 CFR 1152.29, as set forth below; and (5) the condition that BN keep intact the right-of-way underlying the tracks, including bridges, culverts, and similar structures (but not track or related materials) for 180 days from the effective date of this decision and notice to enable any state or local government agency or any other interested person to negotiate the acquisition of the right-of-way for public use. If an interim trail use/rail banking agreement is executed within the 180-day period, the public use condition will expire to the extent the trail use/rail banking agreement covers the same line segment.
5. Subject to the conditions set forth above, BN may discontinue service and salvage track and related materials consistent with interim trail use/rail banking.
6. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

7. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

8. If interim trail use/rail banking is implemented, and subsequently the user intends to terminate trail use/rail banking, the user must send the Board a copy of this decision and notice and request that it be vacated on a specific date.

9. If an agreement for trail use/rail banking is reached by the 180th day from the service date of this decision and notice, interim trail use may be implemented. If no agreement is reached by that time, BN may fully abandon the line, providing the conditions imposed in this proceeding are met.

10. Notice will be published in the *Federal Register* on July 25, 1997.

11. BN must serve a copy of this decision on Ocean Spray and Weyerhaeuser within 5 days after the service date of this decision and certify to us it has done so.

12. Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption, as conditioned, will be effective August 24, 1997.

13. Formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2)¹⁸ and requests for interim trail use/rail banking under 49 CFR 1152.29 must be filed by August 4, 1997; petitions to stay must be filed by August 11, 1997; petitions to reopen must be filed by August 19, 1997.

14. If a formal expression of intent to file an OFA has been timely submitted, an OFA to allow rail service to continue must be received by the railroad and the Board within 30 days after publication, subject to time extensions authorized under 49 CFR 1152.27(c)(2)(ii)(C) and (D). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(2). Each OFA must be accompanied by the filing fee, which currently is set at \$900. *See* 49 CFR 1002.2(f)(25).

15. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **"Office of Proceedings, AB-OFA."**

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

¹⁸ *See Exempt. of Rail Abandonment--Offers of Finan. Assist.*, 4 I.C.C.2d 164 (1987), for regulations in effect at the time of filing of the exemption petition. We note that the ICCTA has made changes and additions to the previous law regarding the processing of abandonments and OFAs. To implement these changes, we have issued final rules in *Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903*, STB Ex Parte No. 537 (STB served Dec. 24, 1996), *modified*, STB served June 27, 1997 (to be effective July 27, 1997)). Because we have processed the exemption petition under the former regulations, we will continue to use those regulations in this proceeding to process an OFA, if one is filed.